say rule. Pet. App. 59-63. The court reasoned that "[petitioner's] statement was not admissible in order to show what [petitioner] might have done or not done on other occasions not proximate to the time the statement was uttered." *Id.* at 61. Instead, "[t]he only purpose for which the statement could have been admitted would have been to establish [petitioner's] state of mind at the time the statement was made." *Ibid.* "That the statement was made at one point during the time of the charged conspiracy cannot be sufficient to mandate its admission," the court continued, "especially where the latter part of the statement—'He's probably an FBI agent'—places doubt on what [petitioner] claims is the probative value and relevance of the statement as a whole." *Id.* at 61-62. The court reasoned that "[w]hether [petitioner's] statement is 'forward-looking' or refers to past acts and events is unclear from the statement itself," and ultimately determined that "it was within the district court's discretion to conclude that the statement, at least in part, applied to past acts of [petitioner's] administration and were to a large extent 'self-serving' attempts to cover tracks already made." *Id.* at 62.[3]

c. Judge Howard concurred in part and dissented in part. Pet. App. 64-75. He noted that he was "not persuaded" that the majority had "convincingly fended off" the defendants' argument that a municipal entity cannot be regarded as a member of an association-in-fact enterprise for RICO purposes. *Id.* at 64-65. Assuming, however, that it could—and that the correct test for determining membership was whether individuals with an

[3] The court of appeals also rejected petitioner's contention, made for the first time on appeal, that the failure to admit the tape recording violated due process. Pet. App. 62-63.

unlawful purpose exercised control over the municipal entity at issue—Judge Howard determined that the government had failed to prove that petitioner and Corrente sufficiently controlled the activities of the named municipal entities that their unlawful purpose could be imputed to those entities. *Id.* at 68-75. He reasoned that evidence that a municipal entity merely "acceded to a mobster's request (but without knowledge of the purposes underlining the request)" was insufficient to meet that requirement. *Id.* at 71. Because Judge Howard would have reversed petitioner's RICO conviction on that ground, he did not reach the issue whether petitioner's tape-recorded statements were admissible. *Id.* at 75.

ARGUMENT

1. Petitioner's contention (Pet. 11-20) that the City of Providence could not constitute a member of a RICO association-in-fact "enterprise" does not warrant further review.

a. RICO defines an "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity." 18 U.S.C. 1961(4) (emphasis added). Although the statute lists only "any union or group of *individuals*" as an example of an association-in-fact enterprise, the courts of appeals have consistently held that the membership of an association-in-fact enterprise is not limited to individuals, but may extend to other legal entities. See, *e.g.*, *United States* v. *Console*, 13 F.3d 641, 652 (3d Cir. 1993), cert. denied, 511 U.S. 1076 and 513 U.S. 812 (1994); *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886

F.2d 986, 995 n.7 (8th Cir. 1989). In so holding, those courts have reasoned that Congress intended the list of "enterprises" in 18 U.S.C. 1961(4) to be illustrative, rather than exhaustive, as reflected by the statute's use of the term "includes." See, *e.g.*, *United States* v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991); *United States* v. *Perlholtz*, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); cf. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (noting that "[t]here is no restriction upon the associations embraced by the definition").

There is no basis for excluding governmental bodies from the legal entities that may be members of an association-in-fact conspiracy under RICO. Cf. Pet. 3 (contending that, because this case involves a governmental entity, "[t]he RICO issue [*i.e.*, whether entities that do not share the illicit purpose of an association-in-fact enterprise may be members of it] is presented here in high relief"). At least one court of appeals has held that governmental entities may not be subject to liability under RICO, on the ground that such entities are themselves "incapable of forming a malicious intent." *Lancaster Cmty. Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992). Even if a governmental entity is immune from liability under RICO, however, the entity can still serve as a member of a RICO enterprise, with the result that persons who participate in the conduct of the enterprise's affairs through a pattern of racketeering activity may themselves be subject to liability. Accordingly, as with other types of legal entities, courts of appeals have uniformly recognized that governmental entities may qualify as members of an association-in-fact enterprise. See, *e.g.*, *United States* v. *Blandford*, 33 F.3d 685, 703

(6th Cir. 1994) (state legislative office), cert. denied, 514 U.S. 1095 (1995); *United States* v. *McDade*, 28 F.3d 283, 296-297 (3d Cir. 1994) (congressional offices); *United States* v. *Dischner*, 974 F.2d 1502, 1511 (9th Cir. 1992) (mayor's office and department of public works), cert. denied, 507 U.S. 923 (1993).

b. Although petitioner apparently does not contend that a governmental entity could never be a member of an association-in-fact enterprise, he does assert (Pet. 14-17) that the courts of appeals have established different standards for when legal entities (including governmental entities) can be members of an association-in-fact enterprise.[1] That assertion lacks merit.

In *Turkette*, this Court defined an association-in-fact enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583. In this case, the court of appeals held that, although a legal entity (such as a governmental entity) could not itself have an unlawful purpose, such a purpose could be imputed to it if the entity's activities were controlled by individuals who themselves had such a purpose and who manipulated the entity's activities for that purpose. Pet. App. 13, 15. When individuals capture control of a governmental entity and conscript it to serve their own ends, it is proper to consider those ends (even if corrupt) in determining whether the entity is pursuing a "common purpose" with

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[1] Petitioner does not also contend that the court of appeals erred by determining that the activities of the governmental entities at issue were controlled by petitioner and his co-defendant Corrente—the issue on which the majority and dissent below disagreed at length. Compare Pet. App. 15-24 (majority), with *id.* at 68-75 (dissent). In any event, that determination was quintessentially fact-bound and does not warrant further review.

the other members of the alleged association-in-fact enterprise. There is no reason to treat the governmental entity's lawful objectives as its only ones, when reality is otherwise. At the same time, the structure of the governmental entity itself helps to ensure that the "enterprise" is "an entity separate and apart from the pattern of activity in which it engages," *Turkette*, 452 U.S. at 583, as well as distinct from the persons liable under RICO, see *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 162-163 (2001).

In asserting (Pet. 14) that the courts of appeals have taken "varying approaches" to the question of when legal entities qualify as members of an association-in-fact enterprise, petitioner cites two decisions of other courts of appeals on which the court below itself relied. Those decisions do not conflict with the decision below. In *United States* v. *Feldman*, 853 F.2d 648 (1988), cert. denied, 489 U.S. 1030 (1989), the Ninth Circuit held that "RICO does not require 'intentional' or 'purposeful' behavior by corporations charged as members of an association-in-fact [enterprise]." *Id.* at 657. The Ninth Circuit proceeded to determine, consistent with *Turkette*, that there was sufficient evidence that there was an ongoing organization and that the members of the organization functioned as a continuing unit. *Id.* at 657-659. At most, *Feldman* suggests that a legal entity may be a member of an association-in-fact enterprise even *absent* a showing that the entity's activities were controlled by individuals who had an unlawful purpose—not that such a showing would be insufficient. And in *Perlholtz*, *supra*, the D.C. Circuit reasoned that the corporations at issue qualified as members of a unitary association-in-fact enterprise because they were "controlled as a practical matter" by individuals who

"sought financial gain from the award of government contracts" and "were instrumental in executing the charged schemes." 842 F.2d at 354. Like the decision below, *Perlholtz* stands simply for the proposition that a legal entity can be regarded as a member of an association-in-fact enterprise if the entity's activities were controlled by individuals who had an unlawful purpose and who manipulated the entity's activities for that purpose.[5]

The other two cases cited by petitioner are likewise unhelpful to him. In *VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000), the court concluded that an alleged association-in-fact enterprise involving a mortgage lender and secondary lenders was invalid because the relationship between the lenders lacked even a "minimal level of organizational structure" and was "too unstable and fluid" to qualify as a "continuing unit" under *Turkette*. *Id.* at 699-700. Similarly, in *Stephens, Inc.* v. *Geldermann, Inc.*, 962 F.2d 808 (8th Cir. 1992), the court concluded that the alleged enterprise was invalid because "[the] group * * * had no structure independent of the alleged racketeering activity" and "[t]he only common factor that linked all [the] parties together and defined them as a distinct group was their direct or indirect participation in [the] scheme to defraud." *Id.* at 815-816. Neither *VanDenBroeck* nor *Stephens* rejects the proposition that a legal entity can qualify as a member of an association-in-fact enterprise

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[5] As petitioner notes (Pet. 16), the D.C. Circuit also determined that the individuals "formed their corporations to further their common objectives." *Perlholtz*, 842 F.2d at 354. The court, however, relied on that fact not in concluding that the corporations qualified as members of a unitary association-in-fact enterprise, but rather in concluding that an individual defendant was *distinct* from the enterprise. See *ibid.*

upon a showing that the activities of the entity were controlled by individuals with an unlawful purpose; instead, each of those cases holds only that the organization at issue lacked sufficient structure to constitute an association-in-fact enterprise. Petitioner therefore fails to identify a circuit conflict that warrants this Court's review.[6]

2. Further review is also unwarranted on petitioner's claim (Pet. 21-29) that his tape-recorded statements to the undercover government agent were admissible under the "state of mind" exception to the hearsay rule.

a. As relevant here, Federal Rule of Evidence 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is admissible even if that statement constitutes hearsay.[7] Rule 803's various exceptions to the hearsay rule are predicated on the notion that, under the circumstances specified in the exceptions, a hearsay statement is inherently reliable. See

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[6] As the court below acknowledged (Pet. App. 11-12), some courts of appeals have held that an association-in-fact enterprise must have an "ascertainable structure" distinct from that inherent in the conduct of the underlying racketeering activity, while others have disclaimed such a requirement. Although petitioner recognizes the existence of cases adopting the "ascertainable structure" requirement, see, *e.g.*, Pet. 18 n.7, he does not explicitly ask this Court to resolve any broader conflict concerning that requirement. This Court has denied review in at least two cases in which other petitioners have asserted such a conflict. See *Kirillov* v. *United States*, 534 U.S. 1043 (2001) (No. 01-5965); *Arthur* v. *United States*, 534 U.S. 1043 (2001) (No. 01-5868).

[7] Petitioner does not dispute that his statements to the government agent constituted hearsay because they were being offered to prove the truth of the matter asserted.

Fed. R. Evid. 803 advisory committee's note. A statement covered by the "state of mind" exception in Rule 803(3), which constitutes a "specialized application" of the "present sense impression" exception in Rule 803(1), is considered to be inherently reliable on the theory that "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Ibid.* Consistent with that theory, courts have held that, where the declarant has "had an opportunity to reflect and possibly fabricate or misrepresent his thoughts," a statement does not qualify for the "state of mind" exception. *United States* v. *LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996); accord *United States* v. *Reyes*, 239 F.3d 722, 743 (5th Cir.), cert. denied, 533 U.S. 961 and 534 U.S. 868 (2001); *United States* v. *Ponticelli*, 622 F.2d 985, 991 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); see generally 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.05[2][a] at 803-29 & n.4 (2d ed. 2000) (citing other cases).

Because petitioner had the "opportunity to reflect and possibly fabricate or misrepresent his thoughts," his tape-recorded statements do not qualify for the "state of mind" exception. As the transcript of the conversation reflects (C.A. App. 347-392), petitioner made the statements at issue during a lengthy meeting over lunch with the government agent, who was posing as an air-conditioning salesman seeking a city contract. At some point either before or during the meeting, petitioner formed the suspicion that the agent was working for the Federal Bureau of Investigation—and subsequently expressed that suspicion to a third party. See *id.* at 382. Moreover, petitioner made the statements at issue—in which he told the government agent, *inter alia*, that "[n]o one

w[ould] ask [him] for a thing," *id.* at 378—even though the subject of corruption had not even been broached. All of those circumstances suggest that petitioner had ample opportunity (and motive) to fabricate his statements, and the court of appeals thus correctly concluded that petitioner's statements do not qualify for the "state of mind" exception.

b. Petitioner contends (Pet. 21, 22) that the court of appeals' decision is inconsistent with this Court's decision in *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892). That contention lacks merit. In *Mutual Life*, this Court merely stated the common-law rule, later codified in Rule 803(3), that a hearsay statement of the declarant's state of mind was admissible where that statement was relevant to the underlying issue in the litigation. *Id.* at 295-296. Although the Court noted that the truth or falsity of such a statement was a matter for the jury, *id.* at 296, the Court did not specifically address whether, and under what circumstances, a statement may be so far removed from a "natural reflex[]" that it would not qualify for the common-law "state of mind" exception, *ibid.* Notably, in asserting that Rule 803(3) left the rule of *Mutual Life* "undisturbed," the Judicial Conference Advisory Committee expressly read *Mutual Life* as doing nothing more than "allowing evidence of intention as tending to prove the doing of the act intended." See Fed. R. Evid. 803 advisory committee's note. *Mutual Life* therefore sheds little light on the circumstances under which a declaration does not qualify for the "state of mind" exception under Rule 803(3).

c. Petitioner correctly notes (Pet. 20-21, 23-26) that the Second Circuit has held that statements are admissible under the "state of mind" exception regardless of

their lack of trustworthiness, reasoning that the credibility of such statements is a matter for the factfinder to resolve. See, *e.g.*, *United States* v. *Laural*, 736 F.2d 5, 8-9 (1984); *United States* v. *DiMaria*, 727 F.2d 265, 271-272 (1984). Petitioner all but acknowledges, however, that the Second Circuit's decisions in *Laural* and *DiMaria* can be reconciled with the decisions of other circuits excluding statements where the declarant had an opportunity to fabricate them. See Pet. 25 (noting that "[a]n inquiry into whether the declarant had time to reflect is similar to, but not the same as, an inquiry into the declarant's credibility"); cf. 2 John W. Strong et al., *McCormick on Evidence* § 274, at 217 n.8 (5th ed. 1999) (suggesting that "these positions share some common ground"). And, contrary to petitioner's assertions (Pet. 21, 23-24), the Seventh Circuit has attempted to reconcile the standards of the Second Circuit and other circuits. In *United States* v. *Peak*, 856 F.2d 825, cert. denied, 488 U.S. 969 (1988), the Seventh Circuit held that a court could not exclude a statement under Rule 803(3) on the ground that the declarant was not credible, but it also recognized that a court *could* exclude a statement on the ground that the degree of reliability inherent in the statement was low. *Id.* at 834. And in other cases, the Seventh Circuit has expressly held that, in deciding whether to exclude a statement under Rule 803(3), a court could consider whether the declarant had the opportunity to fabricate the statement. See, *e.g.*, *United States* v. *Macey*, 8 F.3d 462, 467-468 (7th Cir. 1993); *United States* v. *Harvey*, 959 F.2d 1371, 1375 (7th Cir.

1992); *United States* v. *Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986).[8]

Even assuming, however, that some tension exists in the various circuits' approaches, this case would be a poor vehicle for resolving it. The district court excluded petitioner's statements not on the ground that they were unreliable, but rather on the ground that they were irrelevant to the underlying legal issues because they "did not relate to any predicate act or to any specific matter with respect to which the Government has presented any evidence." Pet. App. 60; 6/6/02 Tr. 107. And while the court of appeals noted that petitioner's statements were "self-serving," it also expressed doubt about the relevance of the statements, noting that "[t]he only purpose for which the statement could have been admitted would have been to establish [petitioner's] state of mind at the time the statement was made" and adding that "[the fact] [t]hat the statement was made at one point during the time of charged conspiracy cannot be sufficient to mandate its admission." Pet. App. 61.[9] To the extent that petitioner's statements were not relevant, they would not be admissible even if they otherwise met

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[8] Petitioner also suggests (Pet. 24) that the Fifth, Sixth, and Ninth Circuits have adopted a standard that "fall[s] somewhere between the ruling of the First Circuit in this case and the contrary holdings of the Seventh and Second Circuits." But the court of appeals in this case *relied* on decisions of the Fifth and Ninth Circuits, see Pet. App. 62, and petitioner identifies nothing in the decision below that squarely conflicts with any Fifth, Sixth, or Ninth Circuit decision.

[9] Petitioner seemingly suggests (Pet. 20) that his statements were relevant because they constituted "statement[s] of future intention." Even assuming, however, that petitioner's statements were forward-looking (as the text of Rule 803(3) itself requires), it is clear that they related only to the particular transaction being discussed. See Pet. App. 60.

the requirements of Rule 803(3). Cf. *Jackson*, 780 F.2d at 1315 (excluding, primarily on relevance grounds, statements about declarants' intent made two years after the actions at issue).[10]

Finally, even assuming that petitioner's statements had some marginal relevance, any error in failing to admit those statements was harmless. Although the court of appeals did not reach the government's argument that any error was harmless, it did recognize, in rejecting petitioner's related due process claim, "the amount of evidence of [petitioner's] criminal knowledge and intent presented at trial." Pet. App. 63. In light of that overwhelming evidence, the exclusion of statements expressing petitioner's intent in the context of events not at issue cannot affect petitioner's substantial rights. Further review of petitioner's evidentiary claim is therefore not merited.

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[10] Petitioner correctly notes (Pet. 29 n.10) that the courts below did not rely on Federal Rule of Evidence 403, which allows the exclusion of *relevant* evidence where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or other considerations. To the extent that the courts below concluded that the evidence at issue had *no* relevance, however, the pertinent rule is not Rule 403, but rather Rule 402, which provides that evidence that is not relevant is not admissible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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